No. 57.

Brief of Blair for Appellee

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JAMES H. MCKENNEY,

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In the Supreme Court of the United States.

OCTOBER TERM, 1898.

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THE HOME FOR INCURABLES, *Appellant*,

vs.

MARY SPENCER NOBLE *et al.*

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Brief for Appellee, Hospital of the University of Pennsylvania.

HENRY P. BLAIR,
Of Counsel.

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STATEMENT OF THE CASE.

By the will of the testatrix, executed June 1, 1892 (7 and 8), it appears that a trust is created whereby her only grand-child is given a life interest in the entire estate, of which the executor is directed to make a conversion into personalty, which life estate is subject to "sooner cease and determine at any time when it is ascertained by my said trustee that any part of my said income shall have been given by said grand-daughter, or in anywise expended by or through her, for the use or benefit of Robert J. Huston, from whom her mother, my daughter, obtained a divorce with custody of said Sophia Yuengling Huston, given absolutely to her said mother." (8.)

When the trust thus created ceased, either by the death of the grand-daughter or by the happening of the prior contingency, it is directed by the third clause of the will that "so much of my said estate shall thereupon be conveyed and delivered over by said American Surety and Trust Company to the Hospital of the University of Pennsylvania, as amounts to five thousand dollars, said five thousand dollars to be used by said hospital to endow and forever maintain a first-class perpetual bed in said hospital in the city of Philadelphia, said bed to be in the name and memory of my beloved son, Malancthon Love Ruth.

"All the residue and remainder of my said estate of whatever kind, after the payment of said five thousand dollars for the establishment of said perpetual bed in said hospital, I give, devise and bequeath to the 'Home for Incurables,' at Fordham, New York City, in the State of New York, its successors and assigns forever, to be used by said 'Home for Incurables,' to endow and forever maintain one or more beds in said home in the name and memory of my beloved son, Malancthon Love Ruth." (8.)

Guardians and an executor are appointed by the subsequent clauses. (8 and 9.)

A codicil, made on the same day, provides: "I hereby revoke and annul the bequest therein made by me to the Home for Incurables, at Fordham, New York City, in the State of New York, and I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend, Emeline Colville, the widow of Samuel Colville, now living in New York City, said bequest being on account of her kindness to my son

and myself during his and my illness and my distress." (9.)

The grand-daughter died after the testatrix, and the executor filed a bill (2-6) for the construction of the will, alleging in paragraph 9 thereof "that because of ambiguity and inconsistency apparent upon the face of said will and codicil, your complainant is in doubt as to whom it should distribute the fund and estate in its hands, and it is advised by counsel, and believes, and hence avers, that it cannot safely proceed further in the administration of the trusts upon it conferred by and under said will and codicil, except under the order and direction of this honorable court." (5.) The case was heard before Mr. Justice Cox in the supreme court of the District of Columbia, who without delivering any opinion signed a decree "that the legal effect of the codicil executed by the testatrix, Mary Eleanor Ruth, on the 1st day of June, 1892, to her will of the same date, as shown in the proceedings, was to revoke the legacy of five thousand dollars given in and by said will to the Hospital of the University of Pennsylvania, and to substitute Mrs. Emeline Colville as the legatee of the said sum of five thousand dollars in the place and stead of said Hospital of the University of Pennsylvania, but not to revoke the residuary bequest in said will contained in favor of the 'Home for Incurables,' at Fordham, in New York City." (29.)

An appeal to the court of appeals of the District of Columbia was taken by all the parties except the executor and the Home for Incurables (the appellant here). That court, by its decree and opinion (36-44), reversed the decree of the court below, and held "that it is the true legal intent and meaning of

the will and codicil that the bequest of five thousand dollars to the Hospital of the University of Pennsylvania remains intact and unaffected by the codicil; that the bequest of the rest and residue of the estate to the Home for Incurables at Fordham, in the city of New York, was and is revoked by the codicil; that out of this rest and residue there is bequeathed to Mrs. Emeline Colville the sum of five thousand dollars, and that the remainder of the estate is distributable to the next of kin, in accordance with the provisions of the statute of distributions." (44.)

On appeal from that decree the cause comes here for hearing.

BRIEF OF THE ARGUMENT.

I. *The codicil revoked the bequest in the will to the Home for Incurables.*

The effect of the codicil (9) from its plain terms, is to revoke the bequest to the Home for Incurables, to give $5,000 to Emeline Colville, and to leave the residue of the estate to the issue of the only grandchild, who, herself, had been the especial object of the bounty of the testatrix, and whose issue would be the natural objects of her bounty.

The language of the codicil mentions the Home for Incurables only, and in its terms applies directly to the said institution. There is no similarity of sound, location, or interest between that institution and the Hospital of the University of Pennsylvania. There is nothing in the codicil itself, except the amount mentioned, which affords any ground for an argument other than that of the revocation of the bequest to the Home. Could language be clearer than this?

"I hereby revoke and annul the bequest therein made by me to the Home for Incurables at Fordham, New York City, in the State of New York;" and again later in the codicil, "said Home for Incurables."

The force and effect of this language is to show that whatever sum the testatrix may have intended to give Mrs. Colville, she was determined that the institution which she *twice* names should not be the recipient of the bounty previously bestowed upon it by the terms of the will. The sum given to Mrs. Colville is mentioned but *once;* the party whose legacy is revoked is *twice* mentioned and once described by location, city and State.

It is beyond contention that the distinguishing element of a legacy is the object of that legacy, and it is always the case that the object of a legacy is distinguished and fixed in the mind of a testator or testatrix long before the amount of the legacy is determined. How many people there are who can mention the persons named as legatees in their will, but who cannot state with exactness the amount of their respective legacies. It frequently happens that the same person will make numerous wills in all of which the beneficiaries are the same, but the amount to be received by each one is in every case changed. As stated before, a legacy is most clearly designated by referring to the name of the legatee.

The first part of said codicil, namely—

"I hereby revoke and annul the bequest therein made by me to the Home for Incurables at Fordham, New York City, in the State of New York,"—

is full and complete in itself, and the subsequent uncertain description of said legacy cannot in any way

defeat the clear and explicit revocation contained in the first part of said codicil.

Would a testatrix confound and mistake the Home for Incurables, at Fordham, New York City, in the State of New York, for the Hospital of the University of Pennsylvania, in the city of Philadelphia? Yet the court must hold such a confusion of names to avoid the plain terms of the codicil in a matter wherein will and codicil do not conflict.

If it be once admitted that the codicil does not operate in accordance with its express terms and "revoke and annul the bequest therein made by me to the Home for Incurables, at Fordham, New York City, in the State of New York," then there remain but two solutions of the case, to wit: First, a construction of the will and codicil at variance with their express terms; second, the holding of the codicil as inoperative and void.

II. *If the question be one of the construction of the effect of the codicil and will taken together, in accordance with the rules of construction in cases where patent ambiguities arise, the most reasonable construction is to revoke the bequest to the Home for Incurables.*

a. What was the intent of the testatrix as disclosed by the paper itself? It will not suffice to say that the testatrix confounded the two institutions. The argument that she confounded the amount rather than the beneficiary is more convincing. It is well said that a general purpose and intent of wills is to avoid intestacy, yet it is clear from the language of this will and codicil that the primary object and intent of this testatrix was *to deprive a divorced son-in-law from any participation in or benefit from her*

property. Doubtless she saw, several days before its execution, the scribe who drafted her will, and expressed her wishes to the above effect. She also had the intention to leave a legacy to the Hospital of the University of Pennsylvania, for the payment of the $5,000 given it is charged by special and unusual language upon the fund and executor immediately upon the determination of the trust "to endow and forever maintain a first-class *perpetual* bed in said hospital in the city of Philadelphia, said bed to be in the name and memory of my beloved son, Malancthon Love Ruth." (8.)

That she had such a disposition of this much of her property clearly in mind is also evident, for she expressly makes the residuary bequest operative "*after* the payment of said five thousand dollars for the establishment of said *perpetual* bed in said hospital." This bed thus to be endowed, and to be maintained, was to be a *perpetual* bed. The adjective "perpetual," used both in the original gift and in the subsequent reference thereto, does not appear in connection with the bequest to the Home for Incurables.

The question then was, what to do with the balance of her estate. The Home for Incurables was a worthy institution, and she still supposed that to keep it away from the *son-in-law* she must give it to some other person. With such instructions she left the scribe, but on her return, several days later, she had meanwhile changed her mind (not an evidence of that fixed scheme of distribution for which the appellant contends), and wished to recognize the kindness of her friend, Mrs. Colville. She also learned that if she allowed the law to take its course,

after these two $5,000 bequests to the Hospital and Mrs. Colville, respectively, the issue of the especial object of her bounty would receive the estate and still to the exclusion of the *son-in-law*. She had already by these two bequests disposed, outside of the family, of nearly half her property as it then existed. Why should not the balance go to those who would naturally be entitled thereto? Would she provide the mother (her grand-child) with the means necessary for comfort and refinement, and then deprive the next generation, if it should arise, of all those means? She saw the wisdom of the law's course, and as the language of the codicil operates revoked the residuary bequest (which had been of the least and last importance in her original scheme of disposition) and gave $5,000 thereof to her friend, Mrs. Colville, leaving the balance to go to the next of kin as descent should cast the same, certain that no portion of her property could ever come into the control of the *divorced son-in-law*, whose existence seems to have created the necessity for the making of the will and whose deprivation from property rights furnished the intent in the mind of the testatrix.

When a person exhibits in a last will and testament sufficient feeling to disinherit an only grandchild "when it is ascertained by my said trustee that any part of my said income shall have been given by said grand-daughter, or in anywise expended by or through her for the use or benefit of Robert J. Huston, from whom her mother, my daughter, obtained a divorce with custody of said Sophia Yuengling Huston, given absolutely to her said mother," (8), the judicial mind need and will not look farther for the motive and intent of the paper.

It is also evident from the will that the testatrix was not aware of the amount of her estate. By the gift to the Hospital of the University of Pennsylvania she makes sure of that bequest, which she wished to be certain, and of the establishment of a "perpetual bed in said hospital in the city of Philadelphia, said bed to be in the name and memory of my beloved son." (8.) She is not certain whether the balance of her estate, by the will given to the Home for Incurables, will establish one or more beds. Hence, when she revokes this bequest to the Home for Incurables and gives $5,000 to Mrs. Colville, she may reasonably have considered that she was disposing substantially of her entire estate.

The will discloses two localities geographically in which the testatrix appears to have been interested, New York City and Philadelphia. By the terms of the codicil she still disposes of her money in New York City. If this codicil were held to revoke that legacy given to the Hospital, the effect would be to dispose of all the estate in *one* locality, instead of the *two* mentioned in the will. Yet it is apparent from the will that the preservation, in Philadelphia, of the "memory of the beloved son," was the first thought in the mind of testatrix when she came to the ultimate disposition of her property.

Much is sought to be made in the argument of the appellant of the fact that the language of the codicil is adapted to the revocation and granting of a bequest. This argument rebounds or falls because of two facts: first, in the will peculiar language is used in creating the legacy to the Hospital, while general terms are used in the grant to the Home; from which facts it is more probable that by gen-

eral terms it was intended to revoke that which was given by general terms; second, the will expressly provided for the conversion of all the decedent's estate into personalty, which makes the language of the codicil the only correct technical language to be used, since the testatrix and scribe have only personal property in mind at the time of the final distribution of the estate.

b. The court has power, where the intention is plain, to insert or transpose words in a will or codicil in order to effectuate a clear intention.

"Where it is necessary in order to effectuate the testator's manifest intention that words should be transposed the court has power to do so."

Baker vs. Pender, 5 Jones, 351.
Linstead vs. Green, 2 Md., 82.
Finley vs. King, 3 Pet., 346-383.

Hence, the court has ample power to insert the words "said bequest" in place of the words "five thousand dollars" where said wording occurs in the codocil, and with such a change the testatrix would have died testate as to her entire estate.

The court can insert the word "thereof" in place of the word "the" in the codicil, by which simple action every doubt and ambiguity is removed, for the codicil would then read "and I hereby give and bequeath *thereof* five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend, Emeline Colville," etc.

III. *The codicil is inoperative and void.*

In the preceding division of the argument attention has been given to the speculative theory of con-

struction, which is necessary to revoke the clear bequest to the Hospital of the University, for, if the court be not persuaded that the codicil revokes the legacy to the Home for Incurables, the question still remains whether the codicil is then operative to revoke any provision of the will. Unless it affects the Home for Incurables, *twice* named in its eight lines, it must be held inoperative, for no other institution is named, and although it is laid down by all books on the subject of the construction and interpretation of wills that the intention of the testator is to govern in the interpretation thereof, there is also an equally well established rule that where there is a clear and explicit devise in the will, ambiguous or uncertain wording in the codicil will not revoke the provision of the will.

"The general position there maintained was that where the terms of the will were clear to give an estate, the words of a codicil must manifest an equally clear intent to revoke it, though if the codicil stood alone its language might seem to require one construction, yet, if the effect of such construction was to revoke a clear grant made by the will, the court will not give it that construction unless the words of revocation by the codicil are equally clear with the language of the grant in the will."

Quincy vs. Rogers, 9 Cush., 290-295.

"Where the devise or bequest in a will is clear and free from doubt the intention to revoke by the codicil must be equally clear and explicit."

Johns Hopkins vs. Pinckney, 55 Md., 365, 381.

"And it is a general rule that in order to revoke a clear devise the intention must be as clear as the devise."

Williams on Executors (6 Am. Ed.), 220.

Mr. Jarmon, in his treatise on wills, says:

"Numerous are the questions which have arisen in regard to the extent to which a codicil affects the disposition of a will or antecedent codicil and which are commonly occasioned by the person framing the codicil not having an accurate knowledge or recollection of the contents of the prior testamentary paper. In dealing with such cases it is an established rule not to disturb the disposition of the will further than is absolutely necessary for the purpose of giving effect to the codicil."

Jarmon on Wills, p. 176.

Therefore, it is contended by counsel for the Hospital of the University of Pennsylvania that the clear devise to this appellant in the will of Mary E. Ruth cannot be revoked by the uncertain and ambiguous wording of the codicil.

The court in this case should not hold that the codicil revokes the legacy to the Hospital of the University of Pennsylvania, because the codicil itself does not revoke it. In order for the court so to hold, it would have to insert in the codicil wording which is not there and it would entirely change the wording and substance of the said codicil.

The court cannot interpret the will and codicil according to conjecture, but unless it finds that the intent of the testatrix is clear the codicil must fall.

If the court should consider that the codicil contains two designations of the legacy desired to be revoked, each of which designations apply equally to two distinct legacies in the will, then the codicil must fall and is void for uncertainty. If the court should deem that the description by name of the legatee of the legacy sought to be revoked is not a more potent designation than the amount of the legacy, then we

have two designations of the legacy, one of which is equal to the other in certainty, namely, the name of the object of the legacy and the amount of the same. In such a case the codicil must fall, as it is impossible for the court to determine therefrom which of the legacies in the said will is intended to be revoked.

The court must carry out the intention of the testatrix, as that intention can be ascertained from the will and the codicil, but if the testatrix's intention as contained in the codicil cannot be clearly ascertained, then the codicil is void for uncertainty, leaving the provisions of the will only to be carried out.

"We should at the same time deprecate that latitudinarian mode of construction whereby courts have attempted to bridge over every chasm in the lawless resort to conjecture based upon no recognized canons of construction, or, what is still more objectionable, if possible, by an utter disregard of the natural and ordinary meaning of the words used, and guided only by the undefined light of extrinsic circumstances in no sense admissible in aid of the legal construction of the instrument.

"It is laid down by Swinburne that a bequest to any person by name where there are two persons of the same name and no means of determining which was intended, must be wholly void; and we do not perceive any ground of escape from such a result where there is no ground whatever, either in the words or circumstances, to incline us to believe that the testator meant one of the persons of that name more than the other."

Redfield on the Law of Wills, Vol. 2, 385, 386.

"The general principle upon which this opinion proceeds may be stated thus: The testator does, by his will, show a clear and manifest intention to devise the Blomer Hill estate to his wife for life, or

during her widowhood. If such devise in the will is clear it is incumbent on those who contend it is not to take effect by reason of a revocation in the codicil to show that the intention to revoke is equally clear and free from doubt as the original intention to devise. For if there is only a reasonable doubt whether the clause of revocation was intended to include the particular devise, then such devise ought undoubtedly to stand."

Hearle vs. Hicks, 8 Bingham, 475, 479.

This court in Robison vs. Portland Orphan Asylum, 123 U. S., 702, has said:

"But little aid, however, in such cases is to be derived from a resort to formal rules or a consideration of judicial determinations in other cases apparently similar. It is a question in each case of the reasonable interpretation of the words of the particular will, with a view of ascertaining through their meaning the testator's intention.

"In applying this principle the supreme judicial court of Massachusetts, in the case of Metcalf vs. Framingham Parish, 128 Mass., 370, 374, speaking by Gray, C. J., said: 'The decision of this question doubtless depends upon the intention of the testator as manifested by the words he has used, *and an omission to express his intention cannot be supplied by conjecture.*' "

And, again, in Wright vs. Denn, 10 Wheaton, 204, at 239, this court said:

"We may indulge conjectures, but the law does not decide upon conjectures, but upon plain, reasonable and certain expressions of intention found on the face of the will."

If the plain, reasonable and certain expression of intention found in the will in the legacy to the Hos-

pital of the University of Pennsylvania, and the equally plain, reasonable and certain expression of intention found in this language of the codicil—

"I hereby revoke and annul the bequest therein made by me to the Home for Incurables at Fordham, New York City, in the State of New York,"—

do not satisfy the court, conjectures may be indulged, but the law does not decide upon them, nor supply by conjecture an omission to express intention.

On the whole case it is respectfully submitted that there is no revocation of the clear legacy given by the terms of the will to the hospital of the University of Pennsylvania, and, therefore, the same stands.

HENRY P. BLAIR,
Of Counsel for Hospital of the University of Pennsylvania.

No. 57 and 61.

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AMERICAN SECURITY AND TRUST COMPANY.

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Appeals from Court of Appeals of the District of Columbia.

Brief for the American Security and Trust Company.

WM. A. McKENNEY,
Solicitor for American Security and Trust Company.

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AMERICAN SECURITY AND TRUST COMPANY.

No. 61.

Brief for the American Security and Trust Company.

On or about October 2, 1895, the American Security and Trust Company filed its original bill in this case in the Supreme Court of the District of Columbia, seeking a judicial ascertainment of the proper persons to whom it should make distribution of the fund in its hands, under the terms of the last will and testament of Mary E. Ruth, deceased, and a codicil thereto.

The facts in the case are abundantly stated in the Record and in the briefs of counsel for the contending parties.

The American Security and Trust Company has no part in the controversy between the several appellants; it holding the position merely of a trustee and stakeholder, interested only in performing its duty and making distribution of the fund in its hands according to a proper construction of said will and codicil and it now is, as it ever has been, ready and willing to abide by and obey any order and decree which the court may deem fit and proper to make in the premises.

WM. A. McKENNEY,
Solicitor for American Security and Trust Company.